MANOGHARAN VEERAMUTHU & ANOR

v.

FAUZIAH MD ISA

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[CIVIL APPEAL NO: 12-20-2004]
13 JUNE 2005

ROAD TRAFFIC: *Negligence - Collision between motorvan and motorcycle - Whether finding of trial judge on issue of liability correct - Whether quantum of damages awarded fair and reasonable - Multiplier - Civil Law Act 1956, ss. 7(3)(iv)(d), 28A(2)(d)(i)*

TORT: *Negligence - Road accident - Collision between motorvan and motorcycle - Whether finding of trial judge on issue of liability correct - Whether quantum of damages awarded fair and reasonable - Multiplier - Civil Law Act 1956, ss. 7(3)(iv)(d), 28A(2)(d)(i)*

DAMAGES: *Personal injuries - Quantum - Plaintiff awarded damages for injuries suffered in a road accident - Whether quantum of damages awarded fair and reasonable*

CIVIL LAW ACT: *Damages - Running-down action - Multiplier - Whether there ought to be a deduction in respect of plaintiff's loss of earnings - Civil Law Act 1956, ss. 7(3)(iv)(d), 28A(2)(d)(i)*

These were two appeals, the first by the defendants against the decision of the learned sessions court judge ('the trial judge') finding the defendants 100% liable to the plaintiff for a collision between a motorvan driven by the first defendant and the plaintiff's motorcycle, and the second a cross-appeal by the plaintiff against the trial judge's award of RM400 per month being the loss of the plaintiff's services as a homemaker. The trial judge had awarded the plaintiff: (i) general damages for pain and suffering amounting to RM70,000; (ii) damages of RM30,000 being the future costs of an operation; (iii) loss of salary in the sum of RM152,640 (using a multiplier of 16 years); (iv) loss of earning capacity to do household work and the children's loss of the mother's services amounting to RM76,800 (also using a multiplier of 16 years); (v) special damages in the sum of RM4,290; and (vi) costs amounting to RM25,980. The main issue requiring consideration was whether the trial judge's decision, in respect of the finding of liability and the quantum of damages awarded to the plaintiff, was correct.

Held (dismissing the defendant's appeal and allowing the plaintiff's cross-appeal):

[1] In the instant appeal, the conflicting versions of the plaintiff and the first defendant made it necessary for the trial judge to refer to the evidence given by the investigating officer, in particular his sketch plan. Having done that, the trial judge accepted the plaintiff's version of the accident as the more probable version. This was the correct approach and the finding of facts could not be said to be against the weight of evidence. It was indeed beyond reproach. In the circumstances, there was no error on the part of the trial judge in his finding that the first defendant was 100% liable. (pp 222 h & 223 b)

[2] In respect of general damages, the trial judge had taken into consideration all the circumstances including all the medical reports tendered before him for the purpose of awarding the quantum of RM70,000. Having examined his grounds of decision, this court was of the view that the award was fair and reasonable, without any error and thereby affirmed. (p 223 g)

[3] In relation to the plaintiff's loss of housekeeping ability and her children's loss of her services, the trial judge was correct in holding that it was claimable, but not under two heads, as they overlapped. Actually, they referred to one and the same subject matter, which must therefore not be claimed separately or severally, but singly as one head only. The plaintiff's right to claim under this head of damages was supported by a number of authorities. (p 224 a-b)

[4] Where there was no evidence that the plaintiff had lost her job, there could be no award. However, pursuant to a consent order dated 10 May 2002, it was an undisputed fact that the plaintiff was earning a salary of RM795 per month that she had lost as a result of the accident. There was also an interim payment of RM35,000 made by the defendant to the plaintiff for the pre-trial loss of earnings from the date of the accident on 12 September 1998 to the date of the consent order on 10 May 2002, covering a period of 44 months at RM795 per month. Hence, the award by the trial judge was correct. (p 225 a-c)

[5] On the issue as to whether there should be a one-third deduction on account of the accelerated interim payment for the plaintiff's loss of earnings, having regard to the clear words contained in s. 28A(2)(d)(i) of the Civil Law Act 1956 governing loss of earnings and the preponderance of authorities, the multiplier should be 16 (as stated in both ss. 7(3)(iv)(d) and 28A(2)(d)(i) of the same Act), which in the instant appeal the lower court had correctly applied. (p 227 d)

[6] This award had to be in keeping with the current costs in obtaining housekeeping services and the award of RM400 per month by the court below appeared not to be commensurate with current costs. In the circumstances, the measure of damages for loss of housekeeping services should be reviewed and enhanced to a more realistic and reasonable figure of RM800 per month. (p 227 g-h)

[Order accordingly.]

Case(s) referred to:

Abraham Ho Ah Loke v. William Manson-Hing [1949] MLJ 37 ***(refd)***

Chan Chin Ming v. Lim Yoke Eng (Lawful Mother of Gan Swee Hock, deceased) [1994] 3 CLJ 687 SC ***(refd)***

Chew Soo Lan v. Ludhiana Transport Syndicate & Anor [1976] 2 MLJ 205 ***(refd)***

Daly v. General Steam Navigation Co Ltd [1980] 3 All ER 696 ***(refd)***

Foong Yit Voon v. Yap Thian & Anor [1963] MLJ 104 ***(refd)***

Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal [2004] 1 CLJ 797 CA ***(foll)***

Kek Kee Leng v. Theresa Bong Nyok Chin & Anor [1978] 1 MLJ 61 ***(foll)***

Latip Che Ngah & Anor v. Maimunah Zakaria [2002] 4 CLJ 442 HC ***(refd)***

Lim Hye Chua v. Lim See Kiat [1940] MLJ 199 ***(refd)***

Liong Thoo v. Sawiyah & Ors [1981] 1 CLJ 126; [1981] CLJ (Rep) 171 HC ***(refd)***

Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ 174 SC ***(refd)***

Mehmet v. Perry [1977] 2 All ER 529 ***(refd)***

Ng Soo Ang v. Chai Chuan Seng (Rayuan Sibil No. P-04-18-1998) (Unreported) ***(foll)***

Pengarah Institut Penyelidikan Perubatan & Anor v. Inthra Devi & Anor [1987] 2 CLJ 420; [1987] CLJ (Rep) 275 SC ***(refd)***

Raja Zam Zam v. Vaithiyanathan [1965] 2 MLJ 252 ***(refd)***

Raji Trnaport Sdn Bhd & Anor v. Idayu Zulkafli [2004] 5 CLJ 479 HC ***(refd)***

Takong Tabari v. Government of Sarawak & Ors & Another Appeal [1998] 4 CLJ 589 CA ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7(3)(iv)(d), 28A(2)(d)

For the plaintiff - Toh Chin Chong; M/s Toh Chin Chong & Co
For the defendants - N Sumathi; M/s SN Fam & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Appeals

Here are two appeals before me.

The first appeal is in enclosure (2) filed by the appellants-defendants ("the defendants") against the decision of the learned sessions court judge Seremban ("the trial judge") who had on 26 February 2004 held the defendants 100% liable to the plaintiff and awarded:

(1) general damages RM70,000 for pain and suffering, together with interest at 8% p.a. from the date of service of the summons on 11 January 1998 to the date of realisation;

(2) damages of RM30,000 being future costs of operation;

(3) loss of salary in the sum of RM152,640 (RM795 x 16 years) together with interest at 4% p.a. from the date of accident on 12 September 1998 to the date of judgment; and 8% from the date of judgment to the date of realisation;

(4) loss of earning capacity to do household work and the children's loss of the mother's services, amounting to RM76,800 (RM400 x 16 years) together with interest at 4% p.a. from the date of accident on 12 September 1998 to the date of judgment; and 8% p.a. from the date of judgment to the date of realisation;

(5) special damages RM4,290 together with interest at 4% p.a. from the date of accident on 12 September 1998 to the date of judgment; and 8% p.a. from the date of judgment to the date of realisation; and

(6) costs of RM25,980.

The second is the cross-appeal in enclosure (5) filed by the plaintiff against the trial judge's award of RM400 per month being the loss of the plaintiff's services as a homemaker.

Factual Background

After a full trial, the trial judge found that on 12 September 1998, at about 11pm, the plaintiff was riding a motor cycle bearing registration No. NAK 9673 from the direction of Lukut heading towards Teluk Kemang when the first defendant who was driving a motor van bearing registration No. BCP 8814 came out of a junction of Happy Garden, Port Dickson, without stopping and collided with the plaintiff's motor cycle at the junction. The plaintiff has consequently sustained personal injuries, for which the first defendant has been held 100% liable, while the second defendant being the first defendant's employer and the registered owner of the motor van was held to be vicariously liable.

The sketch plan (exh. P3) prepared by the investigating officer (SP3) showed that there were glass splinters believed to have originated from the front left side headlight of the defendants' motor van, thereby confirming that the collision had occurred while the plaintiff was on her right of way.

The plaintiff's motor cycle was damaged largely in the middle and left portion, while the defendants' motor van was damaged at the front left side headlight and its left bumper was dented.

The police report lodged by the plaintiff on 8 October 1998 upon her discharge from the hospital is consistent with her evidence adduced in the trial court.

The trial judge had rejected the first defendant's evidence as it was inconsistent with the presence of the glass splinters shown in the sketch plan.

Liability

Ms. N. Sumathi, learned counsel for the appellant, submitted that:

1. the trial judge has occasioned a miscarriage of justice in relation to his finding of facts as the defendant's evidence should be accepted as it is consistent with his police report and the damage to the plaintiff's motorcycle and the defendant's van;

2. the plaintiff's delay in making her police report about one month after the accident renders her police report unreliable; and

3. the conclusion of the trial judge should be examined critically, referring to *Abraham Ho Ah Loke v. William Manson-Hing* [1949] MLJ 37 FC; *Chew Soo Lan v. Ludhiana Transport Syndicate & Anor.* [1976] 2 MLJ 205 FC; and *Lim Hye Chua v. Lim See Kiat* [1940] MLJ 199 FC.

Learned counsel for the plaintiff, Mr. Toh Chin Chong, contended in essence that the trial judge's finding of facts and conclusions were more than justified.

On the basis of the above submissions, I shall first consider the authorities cited for the defendants.

In *Abraham Ho Ah Loke*, *supra*, the plaint (now known as statement of claim) of the plaintiff pleaded quantum meruit and not specific contract. The learned trial judge proceeded on the basis of contract and not quantum meruit. Counsel for the plaintiff did not attempt to support that finding. There was a large volume of documentary evidence such as entries in plaintiff's diary and sketch plans which were inconsistent with the existence of a contract. On appeal, the Court of Appeal reversed the trial judge's decision.

The only question of fact for determination in *Lim Hye Chua*, *supra*, was whether the plaintiff was the natural or adopted son of one Lim Ho Swa who died intestate in China. The trial judge was of the view that the plaintiff was a natural son of the above deceased, but the view was not based on the demeanour of the witnesses. There was a statement from the plaintiff's brother to the police that the defendant "is a brother of my adopted father". That statement was tendered in evidence by a police inspector as exh. 3 which was interpreted by a detective interpreter who confirmed that evidence which in turn was also supported by another disinterested witness. On appeal, the Court of Appeal held that the probabilities were all in favour of the appellant-defendant ("defendant"). Poyser CJ who delivered the judgment of the court enunciated that in such circumstances, the Court of Appeal is in as good a position as the trial judge to decide the issues of fact involved and may differ from the conclusions of the trial judge on questions of fact.

This principle was restated by the Federal Court through the judgment of Gill CJ (M) (as he then was) in *Chew Soo Lan*, *supra*, at p. 207G left and Thomson CJ (as he then was) in *Foong Yit Voon v. Yap Thian & Anor* [1963] MLJ 104, 108.

In my view, the above authorities have clearly demonstrated that the respective trial judges have erred on the finding of facts, being against the weight of evidence, and so could not be sustained on appeal.

However, in the instant appeal, the conflicting versions of the plaintiff and the first defendant made it necessary for the trial judge to refer to the evidence given by SP3 the investigating officer, in particular his sketch plan. Having done that, the trial judge accepted the plaintiff's version of the accident as the more probable version. In my view, this is the correct approach and the finding of facts could not be said to be against the weight of evidence. It is indeed beyond reproach.

In *Kek Kee Leng v. Theresa Bong Nyok Chin & Anor*. [1978] 1 MLJ 61, substantially similar facts were established. The Federal Court attributed 100% liability to the motorist who entered the main road from a side road without stopping at the junction and collided into a motorcyclist, who was on the major road.

In the circumstances, I hold that there was no error on the part of the trial judge in his finding that the first defendant was 100% liable.

General Damages

It was contended for the defendant that the plaintiff's open non-united fracture of left tibia with 5cm shortening can be rectified by way of surgery in order to reduce it to 2½cm, so as to enable her to walk normally, and that in view of the plaintiff's refusal to undergo surgery, the sum of RM70,000 for this injury should be reduced to RM25,000.

The stand taken for the plaintiff was that the award of RM70,000 for pain and suffering and loss of amenities is fair and reasonable.

In my judgment, it is to be noted that the medical report tendered by the parties' respective expert shows that the plaintiff has to use crutches for her to move about, and that her lower limb was not touching the ground. Besides that, she could not stand, hop or squat. The non-united left tibia fracture site has abnormal movement. Her left lower limb was grossly too short for normal ambulation, while her left leg and foot were grossly deformed and had lost the normal alignment. Her ankle has a fixed plantar flexion and her foot was in fixed varus deformity. Her leg has lost its normal contour. Her left knee has a 10 fixed plantar flexion and her foot has a fixed talipes varus of 52. There was no movement in her ankle and subtalar joints. The muscle weakness in the left calf is non-recoverable because of muscle wound.

The trial judge has taken into consideration all the facts and circumstances including all the medical reports tendered before him for the purposes of awarding the abovesaid quantum. Having examined his grounds of decision, I am of the view that this award is fair and reasonable, without any error and is hereby affirmed.

Are Children's Loss Of Plaintiff's Services Claimable?

It was submitted for the plaintiff that the plaintiff's housekeeping ability and her children's loss of her services are both claimable, citing *Raja Zam Zam v. Vaithiyanathan* [1965] 2 MLJ 252; *Daly v. General Steam Navigation Co Ltd* [1980] 3 All ER 696; *Mehmet v. Perry and Another* [1977] 2 All ER 529; *Liong Thoo v. Sawiyah & Ors.* [1981] 1 CLJ 126; [1981] CLJ (Rep) 171 HC.

The contention for the defendant is to the contrary.

In relation to the plaintiff's loss of housekeeping ability and her children's loss of her services, I am of the view that the trial judge is correct in holding that it is claimable, but not under two heads, as they do overlap. Actually, they refer to one and the same subject matter, which must therefore not be claimed separately or severally, but singly as one head only.

The plaintiff's right to claim under this head of damages is supported by a number of authorities.

In *Raja Zam Zam, supra,* the plaintiff who sustained injuries in a motor car accident was a housewife with seven children. As a result of the accident, she was unable to continue to do housework and had to engage servants to help her in household duties. At p. 253 C-D right, Raja Azlan Shah J (now HRH the Sultan of Perak) held, *inter alia,* that she could include the loss of her services in her own claim.

In *Mehmet, supra,* Brian Neil QC sitting as a Deputy Judge assessed damages for the loss of the wife's housekeeping services by reference to the plaintiff's loss of wages.

The English Court of Appeal through the judgment of Bridge LJ in *Daly, supra,* held that the claim for loss of her ability to do her domestic work may be allowed even if she did not in fact employ domestic help, but was assisted by her husband and his sister, as the court would measure this head of damages according to the estimated cost of employing the necessary domestic help.

In *Ling Thoo, supra,* Chan J (later JCA) allowed a claim for loss of housekeeping services where a mother-in-law had gratuitously rendered such services.

Loss Of Earnings

The defendant contended that there was no evidence that the plaintiff had worked as a beautician as the burden was on the plaintiff to prove that there was a real and substantial risk that she has lost her present job, relying on *Pengarah Institut Penyelidikan Perubatan & Anor. v. Inthra Devi & Anor.* [1987] 2 CLJ 420; [1987] CLJ (Rep) 275.

The plaintiff's response is that the defendant has agreed to a sum of RM35,000 by way of interim payment for the plaintiff's pre-trial loss of earnings from the date of accident until the date of the consent order being RM795 per month for 44 months.

In my view, where there is no evidence that the plaintiff has lost her job, as in *Pengarah Penyelidikan Perubatan, supra,* there can be no award. In that case, the then Supreme Court through the judgment of Hashim Yeop A Sani SCJ (later CJ (M)) therefore quashed the award of the court of first instance for the plaintiff's loss of earnings.

However, in the instant appeal, pursuant to the consent order dated 10 May 2002, it is an undisputed fact that the plaintiff was earning a salary of RM795 per month which she has lost as a result of the accident, and that there was the interim payment of M35,000 made by the defendant to the plaintiff for the plaintiff's pre-trial loss of earnings from the date of accident on 12 September 1998 to the date of the consent order on 10 May 2002, covering a period of 44 months at RM795 per month. Hence, I hold that the award by the trial judge in para (3) above is correct.

Any Deduction On Multiplier?

It was argued for the plaintiff that it was not mandatory to make a one-third deduction on account of accelerated payment, referring to *Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal* [2004] 1 CLJ 797 CA, while the defendants had asked the court to give the deduction.

On the issue as to whether there should be a one-third deduction on account of the accelerated interim payment for the plaintiff's loss of earnings, judicial opinions do differ.

In *Chan Chin Ming v. Lim Yoke Eng (Lawful Mother of Gan Swee Hock, deceased)* [1994] 3 CLJ 687, the victim of the road accident died and there was a dependency claim under s. 7(3)(iv)(d) of the Civil Law Act 1956. In essence, this particular provision prescribes that the number of years' purchase "shall be 16". At the trial, the defendants conceded that using the statutory formula set out under s. 7(3)(iv)(d), a multiplier of 16 representing the years of purchase had to be applied. On appeal by the defendant on quite another point, a majority of the then Supreme Court (per Peh Swee Chin SCJ (as he then was) and Dzaiddin SCJ (later CJ Malaysia)) treated the concession as an erroneous admission on a point of law and took the view that the court was not bound by such an admission, thereby reducing the multiplier from 16 to seven. Edgar Joseph Jr SCJ (as he then was) dissented and held that in enacting s. 7(3)(iv)(d), Parliament had intended to take away the discretion of the court to select the appropriate multiplier ie, 16.

Chan Chin Ming, supra, was followed by the Court of Appeal in *Takong Tabari v. Government of Sarawak & Ors & Another Appeal* [1998] 4 CLJ 589.

On the other hand, in *Marappan a/l Nallan Koundar & Anor. v. Siti Rahmah binte Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174, the then Supreme Court had the occasion to consider s. 28A(2)(d) of the same Act which provides that the multiplier "shall be 16" as in s. 7(3)(iv)(d) and held that the mandatory language in s. 28A(2)(d) means that in assessing damages for loss of earnings, the multiplier provided thereunder shall be 16. This was followed by Nik Hashim J (now FCJ) in *Latip Che Ngah & Anor v Maimunah Zakaria* [2002] 4 CLJ 442 where the corresponding words "shall be 16" in s. 7(3)(iv)(d) were considered. The learned judge observed that the interpretation accorded to s. 28A(2)(d) should, on the basis of consistency, be applied to s. 7(3)(iv)(d), and that by using a mandatory term "shall" in s. 7(3)(iv)(d), the court has no discretion to alter the statutory-fixed multiplier of 16 years' purchase, thereby distinguishing and declining to follow *Chan Chin Ming, supra.*

In *Ng Soo Ang v. Chai Chuan Seng* (Rayuan Sibil No. P-04-18-1998) (unreported), another panel of the Court of Appeal held the number of years' purchase shall be 16.

Recently, in *Ibrahim Ismail, supra,* the Court of Appeal considered this issue pertaining to the multiplier contained in the words "shall be 16" prescribed in ss. 7(3)(iv)(d) and s. 28A (2)(d)(i). After an analysis of *Chan Chin Ming, supra,* Gopal Sri Ram JCA, speaking for the Court of Appeal held, *inter alia,* that:

> (1) The majority in the Supreme Court case of *Chan Chin Ming* was wrong and failed to apply the appropriate guide to statutory interpretation. The majority ought to have addressed the object or purpose of the amendments introduced by Parliament by way of ss. 7(3) and 28A CLA. Parliament's purpose was to address the very high award of damages for personal injuries and death and so fixed a formula for the multiplier. When a statute lays down a specific code or formula to meet a particular mischief of the common law, the courts are not at liberty to continue to apply the common law in disregard of the statute. It is this very principle that the majority in *Chan Chin Ming* breached when purporting to interfere with the pre-determined statutory formula. Further, the language of the statute is imperative. It says that "the number of years' purchase shall be 16". The mandatory tenor of this phrase employed by Parliament to convey its message excludes any pretended exercise of judicial power to substitute

some other multiplier for that intended. As such, the dissenting view in *Chan Chin Ming* should be adopted. (pp. 803 d, 804 g, 805 a, f & 806 b-d)

(2) The case of *Chan Chin Ming* was decided before the establishment of this court. It was decided at a point of time when the High Court had original jurisdiction over personal injury and fatal accident claims. Appeals were preferred to the Supreme Court that stood at the apex of the judicature. That is not the case today. All personal injury and fatal accident claims are now solely within the jurisdiction of the subordinate courts. Appeals are to the High Court and finally to this court. This court now stands at the apex in respect of the present claims. If a decision and more so a majority decision of the former Supreme Court is obviously wrong, then it is this court's duty to state so especially when it results in an injustice to the party concerned. (pp 807 g-h & 808 a).

On my part, having regard to the clear words contained in s. 28A(2)(d)(i) governing loss of earnings in the instant case, and the preponderance of authorities, I would respectfully follow the dessenting judgment in *Chan Chin Ming, supra,* and the judgments of the Court of Appeal in *Ibrahim Ismail, supra;* and in *Ng Soo Ang, supra,* and hold that the multiplier should be 16, which in the instant appeal the lower court has correctly applied.

Cross-appeal

The plaintiff pleaded that the award of RM400 per month, for the plaintiff's loss of housekeeping ability and her children's loss of her services, was very much on the low side, not in line with inflation and enhanced cost of living, citing *Raji Transport Sdn Bhd & Anor v. Idayu Zulkafli* [2004] 5 CLJ 479 HC.

The defendant's response is that the award of RM400 should be upheld.

I am of the view that this award has to be in keeping with the current costs in obtaining housekeeping services. While the normal cost of obtaining a foreign maid may be about RM400 per month, there are other expenses to be incurred eg, the fees to the employment agency, incidental expenses such as food and accommodation for a stay-in maid. Our courts have consistently recognised the considerations of inflation and enhanced cost of living: see *Raji Transport, supra,* and the cases cited therein. The award of RM400 by the court below appears not to be commensurate with current costs. In the circumstances, I am of the view that the measure of damages for loss of housekeeping services should be reviewed and enhanced to a more realistic and reasonable figure of RM800 per month.

Conclusion

On the foregoing grounds, I dismiss the defendant's appeal against quantum and liability, and allow the plaintiff's cross-appeal against the award for loss of housekeeping services at RM400 per month, which I hereby set aside and substitute with an award of RM800 per month. Subject to this, all other awards of the trial judge are hereby affirmed.

Costs to the plaintiff.